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5 UNITED STATES  
6 ENVIRONMENTAL PROTECTION AGENCY

7 REGION X

8  
9 IN THE MATTER OF: )

ADMINISTRATIVE ORDER ON  
CONSENT FOR REMOVAL ACTION

10 Lower Duwamish Waterway Superfund Site )  
11 Slip 4 Early Action, Seattle, Washington, )

U.S. EPA Region X  
CERCLA Docket No.

12 City of Seattle, The Boeing Company, )  
13 and King County, )

Proceeding Under Sections 104, 106(a), 107  
and 122 of the Comprehensive  
Environmental Response, Compensation,  
and Liability Act, as amended, 42 U.S.C.  
§§ 9604, 9606(a), 9607 and 9622.

14 Respondents. )  
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1                                    **I. JURISDICTION AND GENERAL PROVISIONS**

2            1. This Administrative Order on Consent (Order) is entered into voluntarily by the  
3 United States Environmental Protection Agency, Region X (EPA) and City of Seattle (City), The  
4 Boeing Company (Boeing) and King County, Washington (County) (collectively the  
5 Respondents). This Order provides for the performance of a non-time-critical removal action by  
6 Respondents and the reimbursement of certain response costs incurred by the United States at or  
7 in connection with such action for Slip 4 at approximately River Mile 2.8 on the Duwamish  
8 Waterway, and within the Lower Duwamish Waterway Superfund Site (Site) in Seattle,  
9 Washington.

10  
11            2. This Order is issued under the authority vested in the President of the United States by  
12 Sections 104, 106(a), 107 and 122 of the Comprehensive Environmental Response,  
13 Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622, as  
14 amended (CERCLA).

15  
16            3. EPA has notified the State of Washington Department of Ecology (State or Ecology)  
17 of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). Ecology is co-  
18 managing and overseeing cleanup of the Site jointly with EPA.

19            4. EPA and Respondents recognize that this Order has been negotiated in good faith and  
20 that the actions undertaken by Respondents in accordance with this Order do not constitute an  
21 admission of any liability. Respondents do not admit, and retain the right to controvert in any  
22 subsequent proceedings other than proceedings to implement or enforce this Order, the validity  
23 of the findings of facts, conclusions of law, and determinations in Sections IV and V of this  
24

Order. Respondents agree to comply with and be bound by the terms of this Order and further agree that they will not contest the basis or validity of this Order or its terms. Respondents agree to undertake all actions required by this Order, including any modifications thereto, and consent to and will not contest EPA's authority to issue or to enforce this Order.

## **II. PARTIES BOUND**

5. This Order applies to and is binding upon EPA and upon Respondents and their successors and assigns. Any change in ownership or corporate or governmental status of a Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter such Respondent's responsibilities under this Order.

6. Respondents are jointly and severally liable for carrying out all activities required by this Order. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Order, the remaining Respondents shall complete all such requirements. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of this Order within 7 days from the Effective Date or within 7 days of their contract to work on the project, and that they comply with this Order. Respondents shall be responsible for any noncompliance with this Order.

## **III. DEFINITIONS**

7. Unless otherwise expressly provided herein, terms used in this Order which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Order or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

1 a. "CERCLA" shall mean the Comprehensive Environmental Response,  
2 Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

3 b. "Day" shall mean a calendar day. In computing any period of time under this  
4 Order, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall  
5 run until the close of business of the next working day.

6 c. "Effective Date" shall be the effective date of this Order as provided in Section  
7 XXX.

8 d. "Engineering Evaluation/Cost Analysis" (EE/CA) shall have the definition and  
9 attributes described in the NCP, as may be modified by this Order.

10 e. "EPA" shall mean the United States Environmental Protection Agency and any  
11 successor departments or agencies of the United States.

12 f. "Ecology" or "State" shall mean the State of Washington Department of  
13 Ecology and any successor departments or agencies thereof.

14 g. "Future Response Costs" shall mean all costs, including, but not limited to,  
15 direct and indirect costs, that the United States has incurred in planning, developing and  
16 negotiating this Order, in reviewing or developing plans, reports and other items pursuant to this  
17 Order, verifying the Work, or otherwise implementing, overseeing, or enforcing this Order,  
18 including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, costs  
19 incurred by EPA associated with EPA's preparation of any EPA decision documents (including  
20 any Action Memoranda or EE/CA approval memo), the costs incurred pursuant to Paragraph 23  
21 (costs and attorneys fees and any monies paid to secure access, including the amount of just  
22 compensation), Paragraph 33 (emergency response), and Paragraph 59 (work takeover), as well  
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as any PRP search or other activities related to Slip 4 undertaken by EPA and/or Ecology at Respondents' request.

h. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

i. "Municipal sewage sludge" shall mean any solid, semi-solid, or liquid residue removed during the treatment of municipal waste water or domestic sewage, and may include residue removed, all or in part, during the treatment of wastewater from manufacturing or processing operations, provided that such residue has essentially the same characteristics as residue removed during the treatment of domestic sewage.

j. "Municipal solid waste" shall mean household waste and solid waste collected from non-residential sources that is essentially the same as household waste. While the composition of such wastes may vary considerably, municipal solid waste generally is composed of large volumes of non-hazardous substances (*e.g.*, yard waste, food waste, glass, and aluminum) and can contain small amounts of other wastes as typically may be accepted in RCRA Subtitle D landfills.

k. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

l. "Order" shall mean this Administrative Order on Consent and all appendices

1 attached hereto (listed in Section XXIX). In the event of conflict between this Order and any  
2 appendix, this Order shall control.

3 m. "Paragraph" shall mean a portion of this Order identified by an Arabic  
4 numeral.

5 n. "Parties" shall mean EPA and Respondents.

6 o. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§  
7 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

8 p. "Section" shall mean a portion of this Order identified by a Roman numeral.

9 q. "Statement of Work" or "SOW" shall mean the statement of work for  
10 implementation of the removal action, as set forth in Appendix A to this Order, and any  
11 modifications made thereto in accordance with this Order.

12 r. "Waste Material" shall mean 1) any "hazardous substance" under Section  
13 101(14) of CERCLA, 42 U.S.C. § 9601(14); 2) any pollutant or contaminant under Section  
14 101(33) of CERCLA, 42 U.S.C. § 9601(33); 3) any "solid waste" under Section 1004(27) of  
15 RCRA, 42 U.S.C. § 6903(27); and 4) any "dangerous waste" under RCW 70.95E.010(1).

16 s. "Work" shall mean all activities Respondents are required to perform under this  
17 Order.  
18

#### 19 **IV. FINDINGS OF FACT**

20 8. EPA finds the following facts which Respondents neither admit nor deny:

21 a. The Lower Duwamish Waterway Superfund Site (Site) consists of the areal  
22 extent of contamination in the Lower Duwamish Waterway. The Waterway has served as  
23 Seattle's major industrial corridor since it was first created by a widening and straightening of the  
24

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1 Lower Duwamish River (and formation of Harbor Island) by the United States Army Corps of  
2 Engineers, completed in 1911. Industrial uses of and along the Waterway have been extensive  
3 since its construction. The Waterway is also habitat to numerous fish and other aquatic species,  
4 and is a migratory corridor for endangered, threatened, and other anadromous fish. The Slip 4  
5 Early Action Area consists of Slip 4 at approximately River Mile 2.8 on the eastern side of the  
6 Lower Duwamish Waterway and west of East Marginal Way, immediately north of the Boeing  
7 Plant II facility at which Boeing has been implementing RCRA Corrective Action, including  
8 sediment work, pursuant to a RCRA 3008(h) Administrative Order on Consent (AOC) issued in  
9 January 1994, and the areal extent of contamination at or from Slip 4 which EPA may determine  
10 after the EE/CA described below is completed should be addressed as part of the Slip 4 Early  
11 Action Area. The term Early Action Area is used to avoid the confusion inherent in having a site  
12 (or many sites as there may be many Lower Duwamish removals) within a Site, and depending  
13 on an upper or lower case "S" to distinguish between them. However, the generic term "site" is  
14 used in numerous EPA guidance, policy and other documents, as well as statutes and regulations.  
15 For purposes of these documents the terms "site" and "Early Action Area" are wholly  
16 interchangeable, and where "site" may inadvertently be used in deliverables or exchanges of  
17 information pursuant to this Order, any ambiguities which cannot be clearly resolved based on  
18 context may require further inquiry.  
19  
20

21 b. The Slip 4 Early Action Area is comprised of intertidal and subtidal estuarine  
22 sediments in an approximately 6-acre area. Most of Slip 4 is owned by Pacific Terminals Inc.,  
23 and a portion of Slip 4 is owned by Boeing. Adjacent upland properties are owned by Crowley  
24 Marine Services Inc., its subsidiary Pacific Terminals Inc., First South Properties LLC, and  
25  
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Boeing. Sediments in Slip 4 were sampled during two investigations in 1997 and one investigation in 1998. The sampling results indicate sediment contamination in portions of Slip 4 that exceed Washington State Sediment Quality Standards, and the primary contaminant of concern is polychlorinated biphenyls (PCBs). A summary of existing data reported 16 of 22 sediment samples exceeding the Washington State's Cleanup Screening Level for PCBs. Sources of releases include industrial releases, sewer system outfalls and urban run-off. Other contaminants found in Slip 4 sediments include metals and phthalates.

c. On September 13, 2001, the Site was listed on the National Priorities List pursuant to Section 105 of CERCLA, 42 U.S.C. 9605, at 66 Fed. Reg. 47583.

d. The City of Seattle is the most populous municipality in the State of Washington. The Boeing Company is a Delaware Corporation doing business in the State of Washington, primarily engaged in aircraft manufacture and aerospace technology. King County is the most populous county in the State of Washington.

e. EPA has not completed a Potentially Responsible Party search for the Site. Additional parties may be potentially liable for releases and contamination at the Site, including the Slip 4 Early Action Area.

## **V. CONCLUSIONS OF LAW AND DETERMINATIONS**

9. Based on the Findings of Fact set forth above EPA has determined that:

a. The Slip 4 Early Action Area is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contamination found at the Slip 4 Early Action Area of the Site, as identified in the Findings of Fact above, includes "hazardous substances" as defined by Section

101(14) of CERCLA, 42 U.S.C. § 9601(14), and/or pollutants or contaminants which may present an imminent and substantial danger to the public health or welfare.

c. Each Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Each Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for performance of response action and for response costs incurred and to be incurred at the Slip 4 Early Action Area of the Site.

Respondents are the "owners" and/or "operators" of a portion of the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1); and/or arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment of hazardous substances at the facility, within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The removal action required by this Order is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Order, will be considered consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

g. A planning period of at least six months exists before field activities beyond sampling and related scoping activities required by this Order must be initiated. An EE/CA shall therefore be performed.

## **VI. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for the Site, including the Slip 4 Early Action Area, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Order, including, but not limited to, all attachments to this Order and all documents incorporated by reference into this Order.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR**

10. Respondents shall retain one or more contractors to perform the Work and shall notify EPA of the name(s) and qualifications of such contractor(s) within 10 days of the Effective Date. Respondents shall also notify EPA in writing of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the Work at least 7 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondents. If EPA disapproves of a selected contractor, Respondents shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within 10 days of EPA's disapproval.

11. Within 7 days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Order and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present or readily available during field Work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's

name, address, telephone number, and qualifications within 7 days following EPA's disapproval.

1 Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating  
2 to this Order shall constitute receipt by all Respondents. Within 7 days after Respondents'  
3 selection of a Project Coordinator, Respondents shall submit a written plan and accompanying  
4 schedule to EPA setting forth how, including all bidding processes for necessary personnel and  
5 equipment, Respondents will implement the Work required by this Order.  
6

7 12. EPA has designated Karen Keeley of the Office of Environment Cleanup (ECL),  
8 Region X, as its Project Coordinator. Except as otherwise provided in this Order, Respondents  
9 shall direct all submissions required by this Order to the EPA Project Coordinator at 1200 Sixth  
10 Avenue, M/S ECL-111, Seattle, WA 98199.  
11

12 13. EPA and Respondents shall have the right, subject to Paragraph 11, to change their  
13 respective designated Project Coordinator. Respondents shall notify EPA 7 days before such a  
14 change is made. The initial notification may be made orally, but shall be promptly followed by a  
15 written notice.  
16

#### 17 **VIII. WORK TO BE PERFORMED**

18 14. Respondents shall perform, at a minimum, all actions necessary to implement the  
19 Statement of Work (SOW), which is attached as Appendix A.

20 15. The actions to be implemented generally include, but are not limited to, the  
21 following: Completion of an EE/CA as set forth in the SOW and in accordance with the NCP,  
22 and implementation of the Early Action Decision for the Slip 4 Early Action Area made by EPA  
23 following completion of the EE/CA.

24 16. The EPA Guidance on Conducting Non-Time-Critical Removal Actions under  
25  
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Superfund (OSWER Directive 9360.0-32) and any additional relevant guidance shall be followed in implementing the SOW.

17. The primary objective of this removal action is to significantly reduce the potential risk to human health and the environment resulting from potential exposure to contaminants present in the Slip 4 Early Action Area.

18. For all Work, EPA may approve, disapprove, require revisions to, or modify a deliverable in whole or in part. If EPA requires revisions, Respondents shall submit a revised deliverable within 10 days of receipt of EPA's notification of the required revisions, unless otherwise noted in the SOW. Respondents shall implement the Work as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the Work and the schedule, and any subsequent modifications, shall be incorporated into and become fully enforceable under this Order.

19. Respondents shall not commence any Work except in conformance with the terms of this Order. Respondents shall not commence implementation of the Work developed hereunder until after receiving written EPA approval pursuant to this Section.

20. Reporting.

a. Respondents shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order every 30th day after the Effective Date until termination of this Order, unless otherwise directed in writing by the EPA Project Coordinator. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of

actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondents who own or control property at the Slip 4 Early Action Area of the Site shall, at least 30 days prior to the conveyance of any interest in real property at the Slip 4 Early Action Area of the Site, give written notice to the transferee that the property is subject to this Order and written notice to EPA and Ecology of the proposed conveyance, including the name and address of the transferee. Respondents who own or control property at the Slip 4 Early Action Area of the Site also agree to require that their successors comply with the immediately preceeding sentence and Sections IX (Site Access) and X (Access to Information).

21. Off-Site Shipments.

a. Respondents shall, prior to any off-site shipment of Waste Material from the Slip 4 Early Action Area to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

i. Respondents shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Respondents shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same

state, or to a facility in another state.

1                   ii. The identity of the receiving facility and state will be determined by  
2 Respondents following the award of the contract for the removal action. Respondents shall  
3 provide the information required by Paragraph 21(a) and 21(b) as soon as practicable after the  
4 award of the contract and before the Waste Material is actually shipped.  
5

6                   b. Before shipping any hazardous substances, pollutants, or contaminants from  
7 the Slip 4 Early Action Area to an off-site location, Respondents shall obtain EPA's certification  
8 that the proposed receiving facility is operating in compliance with the requirements of  
9 CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondents  
10 shall only send hazardous substances, pollutants, or contaminants from the Slip 4 Early Action  
11 Area to an off-site facility that complies with the requirements of the statutory provision and  
12 regulation cited in the preceding sentence.  
13

## 14 15                   IX. ACCESS

16                   22. If any portion of the Slip 4 Early Action Area of the Site, or any other property where  
17 access is needed to implement this Order, is owned or controlled by any of the Respondents, such  
18 Respondents shall, commencing on the Effective Date, provide EPA and its representatives,  
19 including contractors, with access at all reasonable times to the Site, or such other property, for  
20 the purpose of conducting any activity related to this Order.  
21

22                   23. Where any action under this Order is to be performed in areas owned by or in  
23 possession of someone other than Respondents, Respondents shall use their best efforts to obtain  
24 all necessary access agreements within 30 days after the Effective Date, or as otherwise specified  
25

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1 in writing by the EPA Project Coordinator. Respondents shall immediately notify EPA if after  
2 using their best efforts they are unable to obtain such agreements. For purposes of this  
3 Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of  
4 access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist  
5 Respondents in gaining access, to the extent necessary to effectuate the response actions  
6 described herein, using such means as EPA deems appropriate. Respondents shall reimburse  
7 EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in  
8 accordance with the procedures in Section XV (Payment of Response Costs).

9 24. Notwithstanding any provision of this Order, EPA retains all of its access authorities  
10 and rights, as well as all of its rights to require land/water use restrictions, including enforcement  
11 authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or  
12 regulations.  
13

#### 14 **X. ACCESS TO INFORMATION**

15 25. Respondents shall provide copies to EPA, upon request, of all documents and  
16 information within their possession or control or that of their contractors or agents relating to  
17 activities at the Slip 4 Early Action Area of the Site or to the implementation of this Order,  
18 including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking  
19 logs, receipts, reports, sample traffic routing, correspondence, or other documents or information  
20 related to the Work. Respondents shall also make available to EPA, for purposes of  
21 investigation, information gathering, or testimony, their employees, agents, or representatives  
22 with knowledge of relevant facts concerning the performance of the Work.  
23

24 26. Respondents may assert business confidentiality claims covering part or all of the  
25  
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documents or information submitted to EPA under this Order, specifically including contractor costs and documentation thereof, but specifically excluding deliverables required by the attached SOW on which EPA may rely in remedy selection either for the Slip 4 Early Action Area or for the Site, to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(c)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents.

27. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege in lieu of providing documents, they shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

28. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydro geologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the

Slip 4 Early Action Area of the Site.

**XI. RECORD RETENTION**

29. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), each Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Slip 4 Early Action Area of the Site, regardless of any corporate retention policy to the contrary. Until 10 years after Respondents' receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondents shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

30. At the conclusion of this document retention period, Respondents shall notify EPA and Ecology at least 90 days prior to the destruction of any such records or documents, and, upon request by EPA or Ecology, Respondents shall deliver any such records or documents to EPA or Ecology. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA or Ecology with the following:

1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondents. However, no documents,

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reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

31. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Slip 4 Early Action Area of the Site since notification of potential liability by EPA or Ecology or the filing of suit against it regarding the Slip 4 Early Action Area of the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

## **XII. COMPLIANCE WITH OTHER LAWS**

32. Respondents shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all actions required pursuant to this Order shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental, tribal environmental, or state environmental or facility siting laws.

## **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

33. In the event of any action or occurrence during performance of the Work which causes or threatens to cause a release of Waste Material from the Slip 4 Early Action Area of the Site that constitutes an emergency situation or may present an immediate threat to public health

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or welfare or the environment, Respondents shall immediately take all appropriate action.

Respondents shall take these actions in accordance with all applicable provisions of this Order, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondents shall also immediately notify the EPA Project Coordinator or, in the event of his/her unavailability, the Regional Duty Officer, Environmental Cleanup Office, Emergency Response Unit, EPA Region X, 206-553-1263, of the incident or conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondents shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XV (Payment of Response Costs).

34. In addition, in the event of any release of a hazardous substance from the Slip 4 Early Action Area of the Site, Respondents shall immediately notify the EPA Project Coordinator and the National Response Center at (800) 424-8802. Respondents shall submit a written report to EPA within 7 days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11001, *et seq.*

#### **XIV. AUTHORITY OF EPA PROJECT COORDINATOR**

35. The EPA Project Coordinator shall be responsible for overseeing Respondents' implementation of this Order. The Project Coordinator shall have the authority vested in an On-Scene Coordinator (OSC) by the NCP, including the authority to halt, conduct, or direct any

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1 Work required by this Order, or to direct any other removal action undertaken at the Slip 4 Early  
2 Action Area, as well as the authority of a Remedial Project Manager (RPM) as set forth in the  
3 NCP. Absence of the EPA Project Coordinator from the Slip 4 Early Action Area shall not be  
4 cause for stoppage of work unless specifically directed by the EPA Project Coordinator.

#### 5 **XV. PAYMENT OF RESPONSE COSTS**

##### 6 **36. Payments for Future Response Costs.**

7 a. Respondents shall pay EPA all Future Response Costs not inconsistent with the  
8 NCP. On a periodic basis, EPA will send Respondents a bill requiring payment that includes a  
9 SCORPIOS or other regionally prepared cost summary, which includes direct and indirect costs  
10 incurred by EPA and its contractors. Respondents shall make all payments within 30 days of  
11 receipt of each bill requiring payment, except as otherwise provided in Paragraph 39 of this Order.  
12

13 b. Respondents shall make all payments required by this Paragraph by a certified  
14 or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing  
15 the name and address of the parties making payment, the Docket Number of this Order, and EPA  
16 Site/Spill ID number 10AJ, and shall be clearly designated as Response Costs: LDW-Slip 4.  
17

18 Respondents shall send the check(s) to:

19 Mellon Bank  
20 EPA-Region 10  
21 Attn: Superfund Accounting  
22 P.O. Box 360903M  
23 Pittsburgh, PA 15251

24 c. At the time of payment, Respondents shall send notice that payment has been  
25 made, as indicated in Paragraph 12 above, to the Financial Management Officer, Environmental  
26 Protection Agency, Region 10, 1200 Sixth Avenue, M/S OMP-146, Seattle, Washington 98101-

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1128.

1           37. The total amount to be paid by Respondents pursuant to this Section shall be  
2 deposited in the Lower Duwamish Waterway Superfund Site Special Account within the EPA  
3 Hazardous Substance Superfund to be retained and used to conduct or finance response actions at  
4 or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance  
5 Superfund.  
6

7           38. If payments for Future Response Costs are not made within 30 days of Respondents'  
8 receipt of a bill, Respondents shall pay Interest on the unpaid balance. The Interest on Future  
9 Response Costs shall begin to accrue on the date of Respondents' receipt of the bill and shall  
10 continue to accrue until the date of payment. Payments of Interest made under this Paragraph  
11 shall be in addition to such other remedies or sanctions available to the United States by virtue of  
12 Respondents' failure to make timely payments under this Section, including but not limited to,  
13 payment of stipulated penalties pursuant to Section XVIII.  
14

15           39. Respondents may dispute all or part of a bill for Future Response Costs submitted  
16 under this Order, if Respondents allege that EPA has made an accounting error, or if Respondents  
17 allege that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before  
18 payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before  
19 payment is due, Respondents shall pay the full amount of the uncontested costs to EPA as  
20 specified in this Section on or before the due date. Within the same time period, Respondents  
21 shall pay the full amount of the contested costs into an interest-bearing escrow account.  
22 Respondents shall simultaneously transmit a copy of both checks to the persons listed in this  
23 Section above, together with a copy of the correspondence that established and funds the escrow  
24  
25

26 Slip 4 Early Action Area Removal Order - Page 22

1 account, including, but not limited to, information containing the identity of the bank and bank  
2 account under which the escrow account is established as well as a bank statement showing the  
3 initial balance of the escrow account. Respondents shall ensure that the prevailing party or  
4 parties in the dispute shall receive the amount upon which they prevailed from the escrow funds  
5 plus interest within 10 days after the dispute is resolved.

#### 6 **XVI. DISPUTE RESOLUTION**

7 40. Unless otherwise expressly provided for in this Order, the dispute resolution  
8 procedures of this Section shall be the exclusive mechanism for resolving disputes arising under  
9 this Order. The Parties shall attempt to resolve any disagreements concerning this Order  
10 expeditiously and informally.

11 41. If Respondents object to any EPA action taken pursuant to this Order, including  
12 billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within 14  
13 days of such action, unless the objection(s) has/have been resolved informally. EPA and  
14 Respondents shall have 14 days from EPA's receipt of Respondents' written objection(s) to  
15 resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation  
16 Period may be extended at the sole discretion of EPA.

17 42. Any agreement reached by the parties pursuant to this Section shall be in writing and  
18 shall, upon signature by both parties, be incorporated into and become an enforceable part of this  
19 Order. If the Parties are unable to reach an agreement within the Negotiation Period, the Director  
20 of the EPA Region X Office of Environmental Cleanup Office or his/her Associate Director  
21 ("ECL Director") will issue a written decision on the dispute to Respondents. EPA's decision  
22 shall be incorporated into and become an enforceable part of this Order. Respondents' obligations  
23

under this Order shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. Any written statement of objections submitted by Respondents and any accompanying documentation shall be retained by EPA in an Administrative Record at the written request of Respondents or at EPA's discretion if there is no written retention request by Respondents.

#### **XVII. FORCE MAJEURE**

43. Respondents agree to perform all requirements of this Order within the time limits established under this Order, unless the performance is delayed by a *force majeure*. For purposes of this Order, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Order despite Respondents' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance, or a failure to attain performance standards/action levels selected by EPA.

44. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a *force majeure* event, Respondents shall notify EPA orally within 24 hours of when Respondents first knew that the event might cause a delay. Within 10 days thereafter, Respondents shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to



1 prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such  
2 delay to a *force majeure* event if they intend to assert such a claim, including supporting  
3 documentation for such a claim; and a statement as to whether, in the opinion of Respondents,  
4 such event may cause or contribute to an endangerment to public health, welfare or the  
5 environment. Failure to comply with the above requirements shall preclude Respondents from  
6 asserting any claim of *force majeure* for that event for the period of time of such failure to comply  
7 and for any additional delay caused by such failure.

8 45. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure*  
9 event, the time for performance of the obligations under this Order that are affected by the *force*  
10 *majeure* event will be extended by EPA for such time as is necessary to complete those  
11 obligations. An extension of the time for performance of the obligations affected by the *force*  
12 *majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA  
13 does not agree that the delay or anticipated delay has been or will be caused by a *force majeure*  
14 event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is  
15 attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of the  
16 extension, if any, for performance of the obligations affected by the *force majeure* event.  
17  
18

#### 19 **XVIII. STIPULATED PENALTIES**

20 46. Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in  
21 this Section for failure to comply with the requirements of this Order specified below, unless  
22 excused under Section XVII (*Force Majeure*). "Compliance" by Respondents shall include  
23 completion of the activities under this Order or any work plan or other plan approved under this  
24 Order identified below in accordance with all applicable requirements of law, this Order, all  
25

Appendices, and any plans or other documents approved by EPA pursuant to this Order and within the specified time schedules established by and approved under this Order.

47. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 47(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 2,500	1st through 14th day
\$ 5,000	15th through 30th day
\$10,000	31st day and beyond

b. The final and all submitted drafts of the following Compliance Milestones:

1. Summary of Existing Information Report and Sampling and Analysis Plan;
2. Technical Memorandum on Proposed Boundaries of the Removal Action;
3. Engineering Evaluation/Cost Analysis;
4. Project Design Documents;
5. Removal Action Work Plan;
6. Removal Action Completion Report.

48. Stipulated Penalty Amounts - Reports. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate final and all submitted draft reports or other written documents pursuant to this Order that are not listed in Paragraph 47(b):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1st through 14th day
\$ 3,000	15th through 30th day

\$ 7,500

31st day and beyond

1 49. In the event that EPA assumes performance of a portion or all of the Work pursuant to  
2 Paragraph 59 of Section XX, Respondents shall be liable for a stipulated penalty in the amount of  
3 \$1,000,000.  
4

5 50. All penalties shall begin to accrue on the day after the complete performance is due or  
6 the day a violation occurs, and shall continue to accrue through the final day of the correction of  
7 the noncompliance or completion of the activity. However, stipulated penalties shall not accrue:  
8 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the  
9 period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that  
10 EPA notifies Respondents of any deficiency; and 2) with respect to a decision by the ECL  
11 Director under Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st  
12 day after the Negotiation Period begins until the date that the ECL Director issues a final decision  
13 regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate  
14 penalties for separate violations of this Order.  
15

16 51. Following EPA's determination that Respondents have failed to comply with a  
17 requirement of this Order, EPA may give Respondents written notification of the failure and  
18 describe the noncompliance. EPA may send Respondents a written demand for payment of the  
19 penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of  
20 whether EPA has notified Respondents of a violation.  
21

22 52. All penalties accruing under this Section shall be due and payable to EPA within 30  
23 days of Respondents' receipt from EPA of a demand for payment of the penalties, unless  
24 Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution).  
25

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1 All payments to EPA under this Section shall be paid by certified or cashier's check(s) made  
2 payable to "EPA Hazardous Substances Superfund," shall be mailed to the Lockbox number and  
3 address set forth in Paragraph 36b, above, shall indicate that the payment is for stipulated penalties,  
4 and shall reference the EPA Region and Site/Spill ID Number 10AJ, the EPA Docket Number of  
5 this Order, and the name and address of the parties making payment. Copies of check(s) paid  
6 pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to EPA as  
7 provided in Paragraph 12, and to other receiving officials at EPA identified in Paragraph 36c,  
8 above.

9  
10 53. The payment of penalties shall not alter in any way Respondents' obligation to  
11 complete performance of the Work required under this Order.

12 54. Penalties shall continue to accrue during any dispute resolution period, but need not be  
13 paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

14 55. If Respondents fail to pay stipulated penalties when due, EPA may institute  
15 proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the  
16 unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 52.  
17 Nothing in this Order shall be construed as prohibiting, altering, or in any way limiting the ability  
18 of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of  
19 this Order or of the statutes and regulations upon which it is based, including, but not limited to,  
20 penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l),  
21 and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3).  
22 Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of  
23 CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for  
24

1 which a stipulated penalty is provided herein, except in the case of a willful violation of this Order  
2 or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section  
3 XX, Paragraph 59. Notwithstanding any other provision of this Section, EPA may, in its  
4 unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to  
5 this Order.

6 **XIX. COVENANT NOT TO SUE BY EPA**

7 56. In consideration of the actions that will be performed and the payments that will be  
8 made by Respondents under the terms of this Order, and except as otherwise specifically provided  
9 in this Order, EPA covenants not to sue or to take administrative action against Respondents  
10 pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance  
11 of the Work and for recovery of Future Response Costs. This covenant not to sue shall take effect  
12 upon the Effective Date and is conditioned upon the complete and satisfactory performance by  
13 Respondents of all obligations under this Order, including, but not limited to, payment of Future  
14 Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents  
15 and does not extend to any other person.

16 **XX. RESERVATIONS OF RIGHTS BY EPA**

17 57. Except as specifically provided in this Order, nothing herein shall limit the power and  
18 authority of EPA or the United States to take, direct, or order all actions necessary to protect public  
19 health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release  
20 of hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at, or from the  
21 Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce  
22 the terms of this Order, from taking other legal or equitable action as it deems appropriate and  
23  
24  
25

necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

58. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Order is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondents to meet a requirement of this Order;
- b. liability for costs not included within the definition of Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Slip 4 Early Action Area of the Site; and
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

59. Work Takeover. In the event EPA determines that Respondents have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Work as EPA determines necessary. Respondents may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the

1 Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall  
2 pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of  
3 this Order, EPA retains all authority and reserves all rights to take any and all response actions  
4 authorized by law.

5 **XXI. COVENANT NOT TO SUE BY RESPONDENTS**

6 60. Respondents covenant not to sue and agree not to assert any claims or causes of action  
7 against the United States, or its contractors or employees, with respect to the Work, Future  
8 Response Costs, or this Order, including, but not limited to:

9 a. any direct or indirect claim for reimbursement from the Hazardous Substance  
10 Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of  
11 CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

12 b. any claim arising out of response actions at or in connection with the Slip 4 Early  
13 Action Area of the Site, including any claim under the United States Constitution, the Washington  
14 State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. §  
15 2412, as amended, or at common law; or

16 c. any claim against the United States pursuant to Sections 107 and 113 of  
17 CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Slip 4 Early Action Area of the Site.

18 Except as provided in Paragraph 62 (Waiver of Claims), these covenants not to sue shall not apply  
19 in the event the United States brings a cause of action or issues an order pursuant to the  
20 reservations set forth in Paragraphs 58 (b), (c), and (e) - (g), but only to the extent that  
21 Respondents' claims arise from the same response action, response costs, or damages that the  
22 United States is seeking pursuant to the applicable reservation.

23  
24  
25  
26 Slip 4 Early Action Area Removal Order - Page 31

1 61. Nothing in this Agreement shall be deemed to constitute approval or preauthorization  
2 of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. §  
3 300.700(d).

4 62. Respondents agree not to assert any claims and to waive all claims or causes of action  
5 that they may have for all matters relating to the Slip 4 Early Action Area of the Site, including for  
6 contribution, against any person where the person's liability to Respondents with respect to the  
7 Slip 4 Early Action Area of the Site is based solely on having arranged for disposal or treatment, or  
8 for transport for disposal or treatment, of hazardous substances at the Slip 4 Early Action Area of  
9 the Site, or having accepted for transport for disposal or treatment of hazardous substances at the  
10 Slip 4 Early Action Area of the Site, if:

11 a. any materials contributed by such person to the Site constituting Municipal Solid  
12 Waste ("MSW") or Municipal Sewage Sludge ("MSS") did not exceed 0.2% of the total volume of  
13 waste at the Slip 4 Early Action Area of the Site; and

14 b. any materials contributed by such person to the Slip 4 Early Action Area of the  
15 Site containing hazardous substances, but not constituting MSW or MSS, did not exceed the  
16 greater of i) 0.002% of the total volume of waste at the Site, or ii) 110 gallons of liquid materials or  
17 200 pounds of solid materials.

18 63. This waiver shall not apply to any claim or cause of action against any person meeting  
19 the above criteria if EPA has determined that the materials contributed to the Slip 4 Early Action  
20 Area of the Site by such person contributed or could contribute significantly to the costs of  
21 response at the Slip 4 Early Action Area of the Site. This waiver also shall not apply with respect  
22 to any defense, claim, or cause of action that a Respondent may have against any person if such

23  
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25  
26 Slip 4 Early Action Area Removal Order - Page 32



1 person asserts a claim or cause of action relating to the Slip 4 Early Action Area of the Site against  
2 such Respondent.

## 3 **XXII. OTHER CLAIMS**

4 64. By issuance of this Order, the United States and EPA assume no liability for injuries or  
5 damages to persons or property resulting from any acts or omissions of Respondents. The United  
6 States or EPA shall not be deemed a party to any contract entered into by Respondents or their  
7 directors, officers, employees, agents, successors, representatives, assigns, contractors, or  
8 consultants in carrying out actions pursuant to this Order.

9 65. Except as expressly provided in Section XXI regarding De Micromis Waivers and  
10 Section XIX (Covenant Not to Sue by EPA), nothing in this Order constitutes a satisfaction of or  
11 release from any claim or cause of action against Respondents or any person not a party to this  
12 Order, for any liability such person may have under CERCLA, other statutes, or common law,  
13 including but not limited to any claims of the United States for costs, damages and interest under  
14 Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

15 66. No action or decision by EPA pursuant to this Order shall give rise to any right to  
16 judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

## 17 **XXIII. CONTRIBUTION PROTECTION**

18 67. The Parties agree that Respondents are entitled, as of the Effective Date, to protection  
19 from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA,  
20 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Order. The "matters  
21 addressed" in this Order are the Work and Future Response Costs. Except as provided in Section  
22 XXI regarding De Micromis Waivers, nothing in this Order precludes the United States or  
23

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25  
26

1 Respondents from asserting any claims, causes of action, or demands against any persons not  
2 parties to this Order for indemnification, contribution, or cost recovery.

3 68. Respondents agree that with respect to any suit or claim for contribution brought by  
4 them for matters related to this Order, they will notify EPA in writing no later than 60 days prior to  
5 the initiation of such suit or claim. Respondents further agree that with respect to any suit or claim  
6 for contribution brought against them for matters related to this Order, they will notify EPA in  
7 writing within 10 days of service of the complaint on them. In addition, Respondents shall notify  
8 EPA within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days  
9 of receipt of any order from a court setting a case for trial.

10 69. In any subsequent administrative or judicial proceeding initiated by the United States  
11 for injunctive relief, recovery of response costs, or other appropriate relief relating to the Slip 4  
12 Early Action Area or this Order, Respondents shall not assert, and may not maintain, any defense  
13 or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion,  
14 claim-splitting, or other defenses based upon any contention that the claims raised by the United  
15 States in the subsequent proceeding were or should have been addressed in this Order; provided,  
16 however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set  
17 forth in this Order.

#### 20 **XXIV. INDEMNIFICATION**

21 70. Respondents shall indemnify, save and hold harmless the United States, its officials,  
22 agents, contractors, subcontractors, employees and representatives from any and all claims or  
23 causes of action arising from, or on account of, negligent or other wrongful acts or omissions of  
24 Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying  
25

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out actions pursuant to this Order. In addition, Respondents agree to pay the United States all costs  
1 incurred by the United States, including but not limited to attorneys fees and other expenses of  
2 litigation and settlement, arising from or on account of claims made against the United States  
3 based on negligent or other wrongful acts or omissions of Respondents, their officers, directors,  
4 employees, agents, contractors, subcontractors and any persons acting on their behalf or under their  
5 control, in carrying out activities pursuant to this Order. The United States shall not be held out as  
6 a party to any contract entered into by or on behalf of Respondents in carrying out activities  
7 pursuant to this Order. Neither Respondents nor any such contractor shall be considered an agent  
8 of the United States.  
9

10  
11 71. The United States shall give Respondents notice of any claim for which the United  
12 States plans to seek indemnification pursuant to this Section and shall consult with Respondents  
13 prior to settling such claim.

14 72. Respondents waive all claims against the United States for damages or reimbursement  
15 or for set-off of any payments made or to be made to the United States, arising from or on account  
16 of any contract, agreement, or arrangement between any one or more of Respondents and any  
17 person for performance of Work on or relating to the Slip 4 Early Action Area of the Site,  
18 including, but not limited to, claims on account of construction delays. In addition, Respondents  
19 shall indemnify and hold harmless the United States with respect to any and all claims for damages  
20 or reimbursement arising from or on account of any contract, agreement, or arrangement between  
21 any one or more of Respondents and any person for performance of Work on or relating to the Slip  
22 4 Early Action Area of the Site, including, but not limited to, claims on account of construction  
23 delays.  
24

25  
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## **XXV. INSURANCE**

1           73. At least 7 days prior to commencing any field Work under this Order, Respondents  
2 shall secure, and shall maintain for the duration of this Order, comprehensive general liability  
3 insurance and automobile insurance with limits of 5 million dollars, combined single limit. Within  
4 the same time period, Respondents shall provide EPA with certificates of such insurance and a  
5 copy of each insurance policy. In addition, for the duration of the Order, Respondents shall satisfy,  
6 or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations  
7 regarding the provision of worker's compensation insurance for all persons performing the Work  
8 on behalf of Respondents in furtherance of this Order. If Respondents demonstrate by evidence  
9 satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that  
10 described above, or insurance covering some or all of the same risks but in an equal or lesser  
11 amount, then Respondents need provide only that portion of the insurance described above which  
12 is not maintained by such contractor or subcontractor.  
13  
14

## **XXVI. FINANCIAL ASSURANCE**

15           74. Within 30 days of the Effective Date and on the anniversary of the Effective Date every  
16 year thereafter until Notice of Completion of Work in accordance with Section XXVIII below is  
17 received from EPA, Respondents shall establish and maintain financial security in the amount of  
18 \$10 million in one or more of the following forms:  
19  
20

- 21           a. A surety bond guaranteeing performance of the Work;
- 22           b. One or more irrevocable letters of credit equaling the total estimated cost of the  
23 Work;
- 24           c. A trust fund;
- 25

1 d. A guarantee to perform the Work by one or more parent corporations or  
2 subsidiaries, or by one or more unrelated corporations that have a substantial business relationship  
3 with at least one of Respondents; or

4 e. A demonstration that one or more of the Respondents satisfy the requirements of  
5 40 C.F.R. Part 264.143(f).

6 75. If Respondents seek to demonstrate the ability to complete the Work through a  
7 guarantee by a third party pursuant to Paragraph 74(a) of this Section, Respondents shall  
8 demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If  
9 Respondents seek to demonstrate their ability to complete the Work by means of the financial test  
10 or the corporate guarantee pursuant to Paragraph 74(d) or (e) of this Section, they shall resubmit  
11 sworn statements conveying the information required by 40 C.F.R. 264.143(f) annually, on the  
12 anniversary of the Effective Date. In the event that EPA determines at any time that the financial  
13 assurances provided pursuant to this Section are inadequate, Respondents shall, within 30 days of  
14 receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other  
15 forms of financial assurance listed in Paragraph 74 of this Section. Respondents' inability to  
16 demonstrate financial ability to complete the Work shall not excuse performance of any activities  
17 required under this Order.  
18  
19

20 76. If, after the Effective Date, Respondents can show that the estimated cost to complete  
21 the remaining Work has diminished below the amount set forth in Paragraph 74 of this Section,  
22 Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to by  
23 the Parties, reduce the amount of the financial security provided under this Section to the estimated  
24 cost of the remaining Work to be performed. Respondents shall submit a proposal for such  
25

reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Respondents may reduce the amount of the security in accordance with the written decision resolving the dispute.

77. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of the financial assurance only in accordance with the written decision resolving the dispute.

#### **XXVII. MODIFICATIONS**

78. The EPA Project Coordinator may make modifications to any plan or schedule or Statement of Work in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the EPA Project Coordinator's oral direction. Any other requirements of this Order may be modified in writing by mutual agreement of the parties.

*CONSISTENT WITH THE OBJECTIVE*

79. If Respondents seek permission to deviate from any approved work plan or schedule or Statement of Work, Respondents' Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving oral or written approval from the EPA Project Coordinator pursuant to Paragraph 78.

80. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Order, or to comply with all requirements of this Order, unless it

is formally modified.

#### **XXVIII. NOTICE OF COMPLETION OF WORK**

81. When EPA determines, after EPA's review of the Final Removal Action Completion Report, that all Work has been fully performed in accordance with this Order, with the exception of any continuing obligations required by this Order, including post-removal site controls and monitoring, if any, payment of Future Response Costs, or record retention, EPA will provide written notice to Respondents. If EPA determines that any such Work has not been completed in accordance with this Order, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents correct such deficiencies. Respondents shall implement the modified and approved Work Plan and shall submit a modified Final Removal Action Completion Report in accordance with the EPA notice. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Order.

#### **XXIX. SEVERABILITY/INTEGRATION/APPENDICES**

82. If a court issues an order that invalidates any provision of this Order or finds that Respondents have sufficient cause not to comply with one or more provisions of this Order, Respondents shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's order.

83. This Order and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Order. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Order. The following appendices are attached to and incorporated into this Order:

Slip 4 Early Action Area Removal Order - Page 39

1 a. Appendix A: Statement of Work.

2 b. Map generally depicting Slip 4.

3 **XXX. EFFECTIVE DATE**

4 84. This Order shall be effective on the day it is issued by EPA. The undersigned  
5 representatives of Respondents certify that they are fully authorized to enter into the terms and  
6 conditions of this Order and to bind the parties they represent to this document.

7 **XXXI. NOTICES AND SUBMISSIONS**

8 85. Documents including work plans, reports, approvals, disapprovals, and other  
9 correspondence which must be submitted under this Order, shall be sent to the individuals at the  
10 addresses specified below, unless those individuals give written notice of a change to the other  
11 parties. All notices and submissions shall be considered effective one business day after receipt by  
12 Respondent's Project Coordinator, unless otherwise provided. Upon request by EPA, Respondents  
13 shall submit such documents in electronic form.

14 a. Twelve (12) copies of documents to be submitted to EPA shall be forwarded to:

15 Karen Keeley  
16 U.S. Environmental Protection Agency  
17 1200 Sixth Avenue, ECL-111  
18 Seattle, Washington 98101

19 b. One (1) copy of documents to be submitted to EPA shall be forwarded to:

20 Rick Huey  
21 Washington Department of Ecology  
22 Northwest Regional Office  
23 3190 160<sup>th</sup> Avenue SE  
Bellevue, Washington 98504

24 c. Two (2) copies of documents to be submitted to EPA shall be forwarded to:



Kym Takasaki  
U.S. Army Corps of Engineers, Seattle District  
P.O. Box 3755  
Seattle, WA 98124-2255

It is so ORDERED and Agreed this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

BY: \_\_\_\_\_ DATE: \_\_\_\_\_

Lori Cohen  
ECL Unit Manager  
U.S. EPA, Region X

Agreed this \_\_\_\_ day of \_\_\_\_\_, 2003.

For Respondent \_\_\_\_\_

By \_\_\_\_\_

Title \_\_\_\_\_